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No. — 26

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

ANDERSON, CLAYTON & CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and Regulations involved	2
Statement	3
Reasons for granting the writ	8
Conclusion	14
Appendix:	
Opinion of the Court of Claims	1a
Findings of fact	10a
Summary of proceedings following opinion of the court	20a

CITATIONS

Cases:

Allen v. *National Manufacture & Stores Corp.*, 125 F. 2d 239, certiorari denied, 316 U. S. 679 — 9

Aviation Capital v. *Pedrick*, 148 F. 2d 165, certiorari denied, 326 U. S. 723 — 9

Batten, Barton, Durstine & Osborn, Inc. v. *Commissioner*, 9 T. C. 448 — 11

Brockman Oil Well Cementing Co. v. *Commissioner*, 2 T. C. 168 — 11

Brown Shoe Co. v. *Commissioner*, 133 F. 2d 582 — 9

Brown Shoe Co. v. *Commissioner*, 45 B. T. A. 212 — 10

Burrus Mills v. *Commissioner*, 22 T. C. No. 107 — 10, 13

Cluett, Peabody & Co. v. *Commissioner*, 3 T. C. 169 — 11

Commissioner v. *Air Reduction Co.*, 130 F. 2d 145, certiorari denied, 317 U. S. 681 — 9

Commissioner v. *Batten, Barton, D. & O.*, 171 F. 2d 474, certiorari denied, 338 U. S. 816 — 8, 11, 12

Commissioner v. *H. W. Porter & Co.*, 187 F. 2d 939 — 9, 11

Cases—Continued Page

Commissioner v. *Landers Corp.*, 210 F. 2d 188 ... 9, 11, 12
Commissioner v. *Rollins Burdick Hunter Co.*, 174 F. 2d 698 ... 9, 11
Commissioner v. *S. A. Woods Mach. Co.*, 57 F. 2d 635, certiorari denied, 287 U. S. 613 ... 9
Conley, M., Co. v. *Commissioner*, 6 T. C. 250 ... 10
Helvering v. *Edison Bros. Stores*, 133 F. 2d 575, certiorari denied, 319 U. S. 752 ... 9
Landers Corp. v. *Commissioner*, decided June 9, 1952 ... 11
Pepper, Dr., Bottling Co. of Miss. v. *Commissioner*, 1 T. C. 80 ... 11
Pittsburgh Laundry, Inc. v. *Commissioner*, 47 B. T. A. 230 ... 10
Porter, H. W., & Co. v. *Commissioner*, 14 T. C. 307 ... 11
Rollins Burdick Hunter Co. v. *Commissioner*, 9 T. C. 169 ... 11
Superheater Co. v. *Commissioner*, decided March 17, 1943 ... 10
Timken-Detroit Axle Co. v. *Commissioner*, 21 T. C. 769 ... 13
United States v. *Stern Bros. & Co.*, 136 F. 2d 488 ... 9
Wiegand, Edwin L., Co. v. *United States*, 60 F. Supp. 464 ... 9

Statutes:

Internal Revenue Code of 1939, Sec. 22 (26 U. S. C. 1952 ed., Sec. 22) ... 2, 12
Internal Revenue Code of 1954, Sec. 1032 ... 12

Miscellaneous:

H. Rep. No. 1337, 83d Cong., 2d Sess., p. A268 ... 13
S. Rep. No. 1622, 83d Cong., 2d Sess., p. 426 ... 13
Treasury Regulations 111, Sec. 29.22 (a)–15 ... 3, 7, 11

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

ANDERSON, CLAYTON & CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above case on July 13, 1954.

OPINION BELOW

The opinion of the Court of Claims (App. 1a–10a) is reported at 122 F. Supp. 837.

JURISDICTION

The judgment of the Court of Claims was entered on July 13, 1954. (App. 1a.) A motion on behalf of the United States for a new trial or for a rehearing was denied on October 5, 1954. (App. 20a.) The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether, under Section 22 (a) of the Internal Revenue Code of 1939, a corporation is taxable upon the gain it realizes from sales of its "treasury stock", *i. e.*, sales of its own stock which, after original issuance, it reacquires, holds in its treasury, and later sells.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 22. GROSS INCOME.
>
> (a) [As amended by Section 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing) of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, mmerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
> (26 U. S. C. 1952 ed., Sec. 22.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.22 (a)–15. *Acquisition or Disposition by a Corporation of its Own Capital Stock.*—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.

But if a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of the Internal Revenue Code.

STATEMENT

The facts, as found by the court below (App. 10a–19a), may be summarized as follows:

The taxpayer, a Delaware corporation, with its principal office in Houston, Texas, was organized on December 31, 1929. Its original capitalization consisted of $25,842,375 of first preferred stock and $100,000 in common stock. The common stock, consisting of 100,000 shares with a stated value of $1 per share, was issued to its chief managing officials, 44,800 being issued to W. L. Clayton, 31,000 to M. D. Anderson, and the remainder, in varying amounts, to ten minor officials. The common stock was issued to the managing officials as part of a plan to reward and retain competent management, an objective which was deemed by the taxpayer of primary importance to the success of its cotton merchandising business. (App. 10a–11a.)

From the beginning, it was understood by the holders of the common, all of whom were active in the business, that that stock could not be sold to persons other than the managing executives, and that even within that group disposition was to be made according to their respective responsibilities and contributions to management, as determined by the holders of at least 75% of the common stock. It was further understood that no stockholder was entitled to sell his stock, or to keep it, except as directed by the holders of at least 75% of the common stock, and that the respective interests of the holders of the common stock would be ad-

justed among the managerial group as responsibilities changed. (App. 11a.)

In 1931, these restrictions upon the holding of the common stock were embodied in a written agreement between the taxpayer and all the common stockholders. That agreement required the holders of the common stock to endorse their stock to Anderson, as trustee, for a period of ten years, but they retained the right to vote their stock, and to receive dividends thereon. The agreement further provided that upon the death of any common stockholder, the taxpayer would purchase his stock at the book value as of the preceding July 31, adjusted (for appreciation or depreciation of assets) by the taxpayer's executive committee in accordance with the contract. That same adjusted book value was to be used (in the absence of an agreement as to price) as the price at which the taxpayer would acquire the stock of any stockholder desiring to withdraw or required to sell his stock. (App. 12a–13a.) The agreement continued in effect during the taxable year here involved, having been extended in 1943 by another instrument, which altered the provisions relative to the price at which the common stock would be acquired by the taxpayer upon the death or withdrawal of a member or upon a requested sale, so as to provide that common stock would be purchased at $1 per share

plus its proportionate interest in certain surplus accounts (established in accordance with the effective certificate of incorporation of the taxpayer), as determined by its board of directors as of the preceding July 31 (App. 15a–16a).

From time to time, as junior officials assumed more responsibilities and duties, common stock was transferred to them by Clayton and Anderson in accordance with the agreement, so that upon his death in 1939 Anderson held only 18,574 shares of the 31,000 originally issued to him. On December 15, 1939, the taxpayer purchased those 18,574 shares from his estate at $50.79 per share, its valuation under the contract. (App. 13a–14a, 15a, 17a.) During its fiscal year ending July 31, 1944 (the taxable year involved), the taxpayer sold to five of its officials at $112.68 per share, 6,500 of the 18,574 shares which it had acquired from the Anderson estate. No part of the $402,285 difference between the total sales price of $732,420 and the amount of $330,135 which it had paid to the Anderson estate for the 6,500 shares was reported by the taxpayer for income tax purposes.[1] (App. 14a–15a.)

During the taxable year, the taxpayer had no authorized, unissued capital stock.[2] The common

[1] On its books, taxpayer credited the difference to an account called "Capital Surplus." See Finding 14, App. 14a–15a; cf. Finding 23, App. 17a.

[2] No preemptive rights existed as to common stock, which could be issued at the discretion of the board of directors (App. 15a).

stock bought from time to time from shareholders[3] was not cancelled or retired, but held in the treasury. Treasury stock was not voted at meetings of stockholders, nor taken into account in the payment of dividends or in arriving at book value under the agreement, nor was it reflected as an asset in taxpayer's financial statements. (App. 18a,)

The purchase of the 18,504 shares from the Anderson estate in 1939 was in conformity with the plan that the common stock be held only by active management, and it was not for the purpose of investment (App. 18a). The sale of the 6500 shares during the taxable year was to adjust the respective holdings of the taxpayer's officials in accordance with responsibility, and to reward managerial performance by the ownership of common stock which would keep cash in the business and compel the executives to acquire the proprietary interest deemed essential (App. 18a–19a).[4]

[3] Between 1932 and 1943, taxpayer on fifteen occasions purchased shares of its own common stock or sold shares held in its treasury. (See Ex. No. 2, Tr. 3–4.)

[4] The Court of Claims also included in its findings of fact (see Nos. 28 and 29, App. 18a–19a) statements to the effect that the purchase and sales in question were not made by the taxpayer for the purpose of dealing in its stock as it would in the stock of another corporation, but those statements are in our view conclusions of law phrased in the words of the applicable Regulations (Sec. 29.22 (a)–15 of Treasury Regulations 111, *supra*, p. 3).

Similarly the statement by the court in Finding 27 (App. 18a) that "the respective purchases and sales of common stock

The Commissioner of Internal Revenue determined that the taxpayer during the taxable year realized a long term capital gain in the amount of $402,285.00 from the sale of the 6500 shares in question, on which the tax was $106,571.25, and (with adjustments not here material) determined a deficiency of $89,337.66, which was paid by the taxpayer. (App. 19a.) After rejection of its claim for refund (App. 19a), the taxpayer instituted the present action. The Court of Claims, considering that the purchase and sale of the treasury stock was a capital transaction and that the taxpayer was not dealing in its own shares as it might in the shares of another corporation, rendered judgment in taxpayer's favor (App. 1a–10a, 20a). A timely petition for rehearing or for a new trial was filed by the United States and was denied by the court without opinion (App. 20a).

REASONS FOR GRANTING THE WRIT

1. There is a square, express conflict between the decision below and decisions of the courts of appeals for six circuits arising under statutory provisions and regulations identical to those involved in the instant case. *Commissioner* v. *Batten, Barton, D. & O.*, 171 F. 2d 474 (C. A. 2d),

amounted in substance, in the case of purchases by the corporation, to the withdrawal by the stockholder of earnings accumulated during the period of the ownership of such stock, and in the case of sales by the corporation to new managers to a contribution of capital in an amount equal to accumulated earnings" is a conclusion of law.

certiorari denied, 338 U. S. 816; *Aviation Capital* v. *Pedrick*, 148 F. 2d 165 (C. A. 2d), certiorari denied, 326 U. S. 723; *Commissioner* v. *Air Reduction Co.*, 130 F. 2d 945 (C. A. 2d), certiorari denied, 317 U. S. 681; *Commissioner* v. *H. W. Porter & Co.*, 187 F. 2d 939 (C. A. 3d); *Allen* v. *National Manufacture & Stores Corp.*, 125 F. 2d 239 (C. A. 5th), certiorari denied, 316 U. S. 679; *Commissioner* v. *Landers Corp.*, 210 F. 2d 188 (C. A. 6th); *Commissioner* v. *Rollins Burdick Hunter Co.*, 174 F. 2d 698 (C. A. 7th); *Helvering* v. *Edison Bros. Stores*, 133 F. 2d 575 (C. A. 8th), certiorari denied, 319 U. S. 752; *Brown Shoe Co.* v. *Commissioner*, 133 F. 2d 582 (C. A. 8th); *United States* v. *Stern Bros. & Co.*, 136 F. 2d 488 (C. A. 8th). In addition, the decision below is in conflict in principle with the decision of another circuit, under an earlier regulation, *Commissioner* v. *S. A. Woods Mach. Co.*, 57 F. 2d 635 (C. A. 1st), certiorari denied, 287 U. S. 613.[5]

The square conflict of decisions was conceded by the court below. "Notwithstanding the uniformity of the decisions of the Circuit Courts on this issue," said the court, "we are unable to agree with them" (App. 9a). Instead, the court announced that it would follow the inter-

[5] The decision of the Court of Claims in the instant case is also inconsistent with its own prior decision in *Edwin L. Wiegand Co.* v. *United States*, 60 F. Supp. 464. While the court in its opinion stated that this case was "distinguishable on its facts" (App. 9a), we are unable to find any factual differences which warrant a difference in result.

pretation of the regulation which the "Tax Court, notwithstanding reversals, has for a number of years uniformly" adopted (App. 7a). But the day after the decision below was filed the Tax Court, in *Burrus Mills, Inc.* v. *Commissioner*, 22 T. C. No. 107, with five judges dissenting, abandoned its former position and held for the Government "following the Courts of Appeals decisions" on this issue. The decision of the court below, therefore, now stands alone against an array of contrary holdings by all other courts which have considered the question.

The courts of appeals, as noted by the court below, have uniformly held that when a corporation reacquires some of its previously issued stock, retains it in its treasury without retiring or cancelling it, and later sells it at a profit, without any change in its capital structure, it derives a taxable gain. The Tax Court, on the other hand, with some exceptions,[6] has, until the *Burrus Mills* case, held that if a corporation reacquires and then sells (after holding in its treasury) shares of its own stock for such purposes as satisfying contract obligations with or amongst stockholders, equalizing share holdings, eliminating participants desiring to withdraw, implementing

[6] Compare with the cases cited in note 7, *infra*, *M. Conley Co.* v. *Commissioner*, 6 T. C. 250; *Superheater Co.* v. *Commissioner*, decided March 17, 1943 (1943 P-H, T. C. Mem. Dec. 43,129); *Brown Shoe Co.* v. *Commissioner*, 45 B. T. A. 212, and *Pittsburgh Laundry, Inc.* v. *Commissioner*, 47 B. T. A. 230.

employee profit-sharing plans, rewarding deserving employees, or keeping ownership within a particular group, etc., no taxable gain or loss is realized."

2. The decision of the court below is believed to be erroneous and the contrary decisions of the courts of appeals (and now the Tax Court) to be correct.[7] The pertinent regulations, which have been in effect since 1934, provide that "if a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another." Reg. 111, Sec. 29.22 (a)–15, *supra*, p. 3. The Commissioner has consistently interpreted this regulation to mean that transactions by a corporation which purchases its own shares and later resells them (without any readjustment in its capital structure) shall have the same tax consequences as dealings by the corporation in any other asset, including the stock of another

[7] See *Batten, Barton, Durstine & Osborn, Inc.* v. *Commissioner*, 9 T. C. 448, reversed, 171 F. 2d 474 (C. A. 2d); *Rollins Burdick Hunter Co.* v. *Commissioner*, 9 T. C. 169, reversed, 174 F. 2d 698 (C. A. 7th); *H. W. Porter & Co.* v. *Commissioner*, 14 T. C. 30, reversed, 187 F. 2d 939 (C. A. 3d); *The Landers Corp.* v. *Commissioner*, decided June 9, 1952 (1952 P-H T. C. Mem. Dec. ¶52,172), reversed, 210 F. 2d 188 (C. A. 6th), in which the Tax Court had continued to follow its earlier decisions in *Dr. Pepper Bottling Co. of Miss.* v. *Commissioner*, 1 T. C. 80; *Brockman Oil Well Cementing Co.* v. *Commissioner*, 2 T. C. 168, and *Cluett, Peabody & Co.* v. *Commissioner*, 3 T. C. 169.

corporation. This interpretation is consistent with the broad scope of Section 22 (a) of the Internal Revenue Code of 1939, which declares subject to tax "gains, or profits and income derived from any source whatever." It also recognizes that, so long as there is no readjustment in fact in the capital structure of the corporation concerned, the economic gain or loss to the corporation is the same whether it buys and sells its own shares, those of another corporation, or any other asset, and whether or not the making of profits was the purpose of the transactions in question. Nor is the difference between sales of treasury stock and sales of unissued stock one of form alone, as suggested by the court below (App. 8a, 10a).[5] The incidence of taxation in the former case and not the latter is supported, *inter alia*, by the freedom a corporation has in acquiring and disposing of treasury shares as contrasted with the statutory and charter requirements which commonly surround the issuance of new shares.

3. The issue raised by this case presents an important problem in the administration of the revenue law which will be a recurring problem for a number of years to come. Although Section 1032 of the Internal Revenue Code of 1954 pro-

[5] This suggestion was expressly rejected by the Court of Appeals for the Sixth Circuit in *Commissioner* v. *Landers Corp.*, 210 F. 2d 188. See also *Commissioner* v. *Batten, Barton, D. & O.*, 171 F. 2d 474, 476 (C. A. 2d).

vides that "No gain or loss shall be recognized to a corporation on the receipt of money or other property in exchange for stock (including treasury stock) of such corporation", this settles the law only for years after 1953.[9] The present case involves the taxable year ending July 31, 1944. The tax consequences of gains or losses on dealings in treasury stock during the intervening years for this and all other corporations which have used this common and convenient device for controlling the identity of shareholders, rewarding management, etc., remain to be resolved. Two cases are now pending in the Fifth[10] and Sixth[11] Circuits, respectively, on petition for review of decisions of the Tax Court. The Commissioner of Internal Revenue has informed us that at least nine other cases are pending and that undoubtedly additional cases will arise on audit or as a result of claims filed on the basis of the instant decision of the Court of Claims. These cases, moreover, commonly involve a substantial amount of tax. Thus the tax

[9] It may be noted that the reports of the Congressional Committees concerning that section state that its purpose was "to remove the uncertainties of present law". H. Rep. No. 1337, 83d Cong., 2d Sess., p. A268; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 426. But the only uncertainty in the law at the time of those reports (March 9 and June 18 of 1954, respectively) was caused by the persistent adherence of the Tax Court to the position which it has since abandoned.

[10] *Burrus Mills, Inc.* v. *Commissioner*, 22 T. C. No. 107, petition for review filed by taxpayer, Nov. 26, 1954.

[11] *Timken-Detroit Axle Co.* v. *Commissioner*, 21 T. C. 769, petition for review filed by Commissioner, July 12, 1954.

involved in the 12 pending cases, including the instant case, totals in excess of $830,000. Accordingly we believe that this case presents an important question which should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

JANUARY 1955.

APPENDIX

229864—54

APPENDIX

In the United States Court of Claims

No. 626-52

(Decided July 13, 1954)

ANDERSON, CLAYTON & CO. v. THE UNITED STATES.

Mr. John C. White for plaintiff.

Mr. John A. Rees, with whom was *Assistant Attorney General H. Brian Holland*, for defendant. *Messrs. Andrew D. Sharpe* and *Lee A. Jackson* were on the brief.

OPINION

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover $100,571.25 with interest thereon as provided by law. The principal sum represents the income tax assessed by the Commissioner of Internal Revenue and paid by plaintiff on the $402,285 difference between the amount at which plaintiff purchased 6,500 shares of its capital stock from a deceased official in 1939 and the amount at which it sold and reissued the stock to other officials during its fiscal year ending July 31, 1944. Plaintiff takes the position that no taxable long term capital gain resulted from the transaction because plaintiff was not dealing in the stock as it might have in the shares of another corporation, and that under the provisions of section 22 (a) of the Internal Revenue Code and section 29.22 (a)-15 of Treasury Regulation 111, all the facts and circumstances surrounding the transaction show that no taxable gain arose to plaintiff.

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Defendant contends that Regulation 111, section 29.22 (a)–15 does not entitle plaintiff to recover as that regulation has been construed by the Circuit Courts of Appeal for several circuits on facts sufficiently similar to the facts in this case to be persuasive.

Section 22 (a) of the Code provides:

> GENERAL DEFINITION.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Regulation 111, section 29.22 (a)–15 provides:

> *Acquisition or disposition by a corporation of its own capital stock.*—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.
>
> But if a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of the Internal Revenue Code.

The facts as stipulated by the parties may be summarized as follows: Plaintiff was organized in 1929 as a cotton

merchandising business with a capitalization of $25,842,375 of first preferred stock and $53,312.50 of common stock. In 1930 an additional 46,687½ shares of common stock were sold at $1 per share, making the total common stock outstanding 100,000 shares. The capital value of the no par value common stock was fixed at a stated value of $1 per share and was sold at that price to the managing officials of the corporation. No preemptive rights existed as to the common stock.

Because of the complex nature of the cotton merchandising business and the essentiality of long experience for its top executives in all phases of the business, it was decided to use the common stock of the corporation as a means to attract, retain, and incite incentive in such top officials. In 1931 a written agreement was entered into between the corporation and the various company officials who owned all the common stock whereby each of the owners endorsed his stock to Monroe D. Anderson as trustee for a period of 10 years, which period was subsequently extended, with the stockholders retaining the right to vote the stock and receive dividends thereon. The agreement provided that the stockholders would not assign, transfer, or otherwise dispose of their stock without the written consent of the holders of 75 percent of the stock; that on the death of any party to the agreement the corporation would purchase the stock of the deceased person at the special book value determined as of July 31 immediately preceding the death according to the provisions contained in the agreement relative to the annual determination of value by the executive committee of the corporation, but in no event less than $1 per share, plus 6 percent interest from such date to the date of death. The value of the trusteed stock was to be determined annually from a supplementary balance sheet which had been adjusted to show appreciation and depreciation of the value of properties held by the corporation and its subsidiaries to reflect its true net worth. The owners of 75 percent of the stock could request any party to the agreement to sell all or part of his stock to the corporation or to such person as the owners of the 75 percent might designate, either upon terms agreeable to

seller and buyer or in the absence of such agreement, at the value fixed for the stock in the annual supplementary balance sheet. Any owner of the stock could sell his stock to the corporation at any time upon the same terms. Any common stock purchased by the corporation under the agreement could be sold to the remaining parties or to any other person whom the owners of 75 percent of the remaining stock might designate. A more complete summary of the agreement is set forth in finding 6.

As junior officials in the corporation assumed more responsibilities W. L. Clayton, and M. D. Anderson who at first had owned the bulk of the trusteed stock, transferred shares of their stock to such junior officials in accordance with the provisions of the agreement. At Mr. M. D. Anderson's death in 1939, he held only 18,574 shares of the 31,000 originally issued to him. All transfers of the stock were made to persons occupying positions of managerial responsibility in the business and at the values determined under the agreement.

Upon the death of Mr. Anderson, the plaintiff corporation purchased his 18,574 shares at the contract value of July 31, 1938, which with interest, amounted to $50.79 a share or a total of $943,373.46. The cost over the $1 stated value of 15,539 of these shares was charged to the Surplus Allocated to Common Stock account. The remaining 3,035 shares of this particular stock were sold to another company official in accordance with the agreement, based on the July 31, 1939, contract value of $32.27 a share and the net "loss" of $18.52 a share or $56,208.20 was charged directly to the Surplus Allocated to Common Stock account. This stock was not retired but was held as treasury stock. While in the treasury no dividends could be paid on it and it could not be voted. Also 1,000 of these shares were sold in 1941 at $33.62 a share and the $32,620 over stated value was credited to the Surplus Allocated to Common Stock account reflecting a "loss" of $17,170 on these shares. Although the corporation sold some of these shares for less than it had paid the deceased official's estate for them, this amount was not deducted from income but was reflected in Surplus as above stated, which resulted only in a smaller Surplus Allocated to

Common Stock, maintaining the equity for all common stockholders equivalent to that existing before the sales.

In December 1943, the corporation and its stockholders decided to sell 6,500 shares of the Anderson Estate stock to five of the corporation's junior officials at $112.68 a share, which was the July 31, 1943, supplementary balance sheet value less a $10 dividend payable to the old common-stock holders. The amount over the $1 stated value was credited to the Capital Surplus account (plaintiff relabeled and consolidated some of its surplus accounts) and no income was reported. It is the difference, $402,285, between the amount paid the Anderson Estate in 1939 for the stock and the price at which the stock was transferred to the junior managing officials during the fiscal year ending July 31, 1944, that the Commissioner of Internal Revenue determined to be a taxable long-term capital gain. Timely claim for refund was made, and denied.

Plaintiff points out that under its certificate of incorporation and the trust agreement between itself and its common-stock holders, the transaction in question amounted in substance to the payment to the deceased stockholder of his capital contribution plus his share of undistributed earnings, and in the case of the sale to the new officials, to the equalization of their capital investment with that of the other common-stock holders as represented by the outstanding shares before the sale. Plaintiff contends that when the real nature of the transaction is considered it certainly was not dealing in its own shares as it might in the shares of another corporation and that if the first and third sentences of the Regulation mean anything, they must have been intended to exclude from taxation any gain resulting therefrom.

Prior to 1934 the law on taxable gain or loss on the acquisition and sale of a corporation's own stock was relatively clear. The Commissioner's regulations provided that no gain or loss was realized from a corporation purchasing or selling its own stock.[1] This rule was reasonable, logical

[1] U. S. Treas. Reg. 45, Art. 542 (1918 Act); U. S. Treas. Reg. 62, Art. 543 (1921 Act); U. S. Treas. Reg. 65, Art. 543 (1924 Act); U. S. Treas. Reg. 69, Art. 543 (1926 Act); U. S. Treas. Reg. 74, Art. 66 (1928 Act); U. S. Treas. Reg. 77, Art. 66 (1932 Act).

and in accord with the accountant's view.[2] The First Circuit in 1932, in its opinion in *Commissioner* v. *Woods Machine Co.*, 57 F. 2d 635, laid the groundwork for the Commissioner to make a complete about-face insofar as the taxation of treasury stock was concerned. On May 2, 1934, T. D. 4430 [XIII-1 C. B. 36] was promulgated amending the regulations to provide, with certain exceptions not here material, as they do today. Although the retroactive application of the part pertinent herein of the regulation was held invalid by the Supreme Court, the Court did not decide whether its prospective application would be valid. *Helvering* v. *Reynolds Co.*, 306 U. S. 110. The validity of this regulation has been specifically sustained or assumed to be valid by the Circuit Courts[3] and this court[4] although apparently no real distinction can be made between the sale of unissued stock, which is unquestionably a capital transaction resulting in the realization of no income or loss, and the sale of treasury stock. Treasury stock is not subjected to as high a stamp tax, is nonassessable, and is free from preemptive rights and sales price restrictions. It may be noted in this respect that the common stock of plaintiff corporation was no-par-value stock and carried no preemptive rights on original issue. None of these distinctions appear relevant in determining whether the sale of treasury stock is a capital transaction. Insofar as the corporation is concerned the sale of unissued stock and the sale of treasury stock each involve a contribution of capital by the stockholder to the corporation with the

[2] Paton, Accountant's Handbook (3rd ed.), pp. 1006-1014; Report of the Committee on Accounting Procedure (American Institute of Accountants 62 J. Accountancy 417 (1938); Security and Exchange Commission Accounting Series, Release No. 6 (1938).

[3] *Allen* v. *National Manufacture & Stores Corp.*, 125 F. 2d 239, certiorari denied, 316 U. S. 679; *Aviation Capital* v. *Pedrick*, 148 F. 2d 165, certiorari denied, 326 U. S. 723; *Brown Shoe Co.* v. *Commissioner*, 133 F. 2d 582; *Commissioner* v. *Air Reduction Co.*, 130 F. 2d 145, certiorari denied, 317 U. S. 681; *Commissioner* v. *Batten, Barton, Durstine & Osborn, Inc.*, 171 F. 2d 474, certiorari denied, 338 U. S. 816; *Commissioner* v. *Landers Corp.*, 210 F. 2d 188; *Commissioner* v. *H. W. Porter & Co.*, 187 F. 2d 939; *Commissioner* v. *Rollins Burdick Hunter Co.*, 174 F. 2d 698; *Dow Chemical Co.* v. *Kavanagh*, 129 F. 2d 42; *Helvering* v. *Edison Bros. Stores*, 133 F. 2d 575, certiorari denied, 319 U. S. 752; *United States* v. *Stern Bros. & Co.*, 136 F. 2d 488. Judge Frank, in a concurring opinion in *Commissioner* v. *Batten, Barton, Durstine & Osborn, Inc.*, *supra*, after stating that it was irrational to ever consider treasury stock as a capital asset said: "The situation then, to my mind, is like that in a farce: An untenable premise, once adopted, is to be carried out logically."

[4] *Wiegand Co.* v. *United States*, 194 C. Cls. 111.

corporation incurring the same obligation and duties to the stockholder, and the purchase of the stock for retirement and resale each involve a repayment of capital to the stockholder by the corporation. Cf. *E. R. Squibb & Sons* v. *Helvering*, 98 F. 2d 69. Also, treasury stock, like unissued stock, does not have an intrinsic value, but merely represents the power and right to issue additional stock. While in the treasury this stock earns nothing for the corporation, dividends are not paid on it, nor does it carry voting or any of the other rights incident to outstanding stock. It would be a courageous step to hold that a corporation can never realize income on the sale of treasury stock because it is a capital transaction. We do not find it necessary to consider whether this step should be taken because the plaintiff is entitled to recover under the plain terms of the regulation as we construe it.

The Commissioner's position that income may be realized by a corporation on the sale of treasury stock may be justified on the ground that as a practical matter some corporations do deal in their own stock just as though it were an asset, buying it, holding it as an investment, and selling it at opportune times. That is the type of situation that we believe the portion of the regulation here in question covers.

The Tax Court, notwithstanding reversals, has for a number of years uniformly applied this regulation literally and examined the real nature of the transaction considering all the facts and circumstances in determining whether or not the transaction resulted in a taxable gain. The Tax Court maintains the position that if a corporation buys and sells its own shares for the purpose of satisfying contractual obligations, equalizing shareholdings, eliminating a participant wishing to retire, implementing an employee profit sharing plan, or keeping the ownership of the corporation within a particular group, the corporation is not dealing in its own shares as it would in another corporation because the treasury shares are not treated as assets and are not bought and sold for the purpose of making a profit, and accordingly holds that no taxable gain or loss is realized.[1]

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[1] *Dr. Pepper Bottling Co. of Miss.*, 1 T. C. 80; *Brockman Oil Well Cementing Co.*, 2 T. C. 168; *Cluett, Peabody & Co., Inc.*, 3 T. C. 169; *Rolling Burdick Hunter Co.*, 9 T. C. 169, *rev'd* 174 F. 2d, 698; *Batten, Barton, Durstine &*

The Circuit Courts of Appeal have, with equal uniformity, with some judges dissenting, adopted the position that unless the corporation repurchasing its own stock legally retires it according to State law and issues new stock, the transaction results in taxable gain or loss to the corporation.[6]

We agree with the Tax Court's position because: (1) we entertain some doubt as to whether a corporation's purchasing and selling its own stock is not really a capital transaction, (2) the basis for the Circuit Courts' decisions is one of form only in that it rests entirely on the failure of the corporation to go through the formal mechanics of actually retiring the stock and issuing new stock, and (3) the plain terms of the regulation support the Tax Court's position. When the regulation is viewed in this light, plaintiff falls comfortably within the language and purview of the regulation. The plaintiff did not purchase the stock at opportune times. It was obligated by contract to repurchase the stock when a stockholder died, at a price equal to the book value of the stock as determined from a supplementary balance sheet reflecting the true net worth of the corporation. This is how the stock in question was purchased by the corporation. The corporation was also obligated to purchase the stock of any common-stock holder who left the corporation, or for any reason withdrew from the agreement, at a negotiated price or in the event of their inability to agree, at the price determined similar to that of a deceased stockholder. The time of sale was clearly not dictated by profit on the sale of the stock. As a matter of fact some of the stock was sold at a "loss," and the approval of 75 percent of the common-stock holders was required for these transactions. The provisions of the certificate of incorporation and the trust agreement were designed to attract, retain, and incite incentive in competent officials, which were a necessity because of the complex nature of its business. The common stock was trusteed under conditions that assured its receipt and retention by only active management and its redistribution according to changing managerial responsibility.

Osborn, Inc., 9 T. C. 438, *rev'd* 171 F. 2d 474; *H. W. Porter & Co.*, 14 T. C. 307, *rev'd* 187 F. 2d 939; *The Landers Corp.*, 11 T. C. M. 577, *rev'd* 210 F. 2d 186; *Timken-Detroit Axle Co.*, 21 T. C. No. 85 (decided Feb. 26, 1954).

[6] See footnote 3.

Pursuant to its certificate of incorporation and the trust agreement, plaintiff purchased Mr. M. D. Anderson's 18,574 shares at his death in 1939, for the contract value of $50.79 a share. In 1943, in accordance with plaintiff's policy, it sold 6,500 of these shares to junior officials of the corporation for $112.68 a share, which was the contract value less a $10 dividend payable to the old common-stock holders. This differential, which the Commissioner claims should be taxed, represents largely, if not entirely, accumulated earnings of the corporation which have already been subjected to tax. The respective purchases and sales of this common stock amounted in substance (1) in the case of purchases by the corporation, to the withdrawal by the stockholder of his capital contribution plus his undistributed earnings accumulated during the period of his ownership of such stock, and (2) in the case of sales by the corporation to new managers, to a contribution of capital in an amount equal to the existing stockholder's contributed capital plus accumulated undistributed earnings so as to equalize the equity of all common-stock holders and the distributions thereafter during the ownership of such stock by the executive permitted to buy it. On these facts it is rather difficult to comprehend how plaintiff corporation realized an accession to income. Upon examining the real nature of the transaction, considering all the facts and circumstances, we arrive at the conclusion that plaintiff was not dealing in its own shares as it might in the shares of another corporation.

The *Wiegand Co.* v. *United States* case, 104 C. Cls. 111, upon which defendant relies, is distinguishable on its facts.

Notwithstanding the uniformity of the decisions of the Circuit Courts on this issue, we are unable to agree with them. To say that there is a taxable gain merely because there is a difference between the purchase and sales price is really to assume the question in issue. There also can be a difference in the cost of stock retired and the price at which new stock is issued, but the resulting difference is not taxable or deductible because it is a capital transaction. Consequently, the question that confronts the court in these cases, assuming the regulation to be valid, is whether the

treasury stock was treated in substance as an asset rather than stock of the corporation. To do this requires an examination of all the facts and circumstances of the case. Although the Circuit Courts' view, considering the one factor of failing to actually retire the stock as controlling, is an expeditious method of determining taxability of treasury stock, it must be conceded that this distinction between treasury stock and unissued stock is one of form. Moreover, it would be equally expeditious to hold that the acquisition and sale of a corporation's own stock was a capital transaction, since it does as a practical matter result in readjustment of capital and find support in the famous case of *Eisner* v. *Macomber*, 252 U. S. 189. We therefore conclude that plaintiff is entitled to recover $100,571.85 plus interest allowed by law.

It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

Judge LARAMORE took no part in the consideration or decision of this case.

FINDINGS OF FACT

The court, having considered the evidence, the briefs and argument of counsel, and the report of Commissioner Wilson Cowen, makes the following findings of fact:

1. The plaintiff, Anderson, Clayton & Co., is a corporation organized on December 31, 1929, and existing under the statutes of the State of Delaware, with its principal business office at Houston, Texas.

2. Upon the organization of Anderson, Clayton & Co. in 1929, the corporation issued $25,842,375 of its 6½ percent preferred and 53,312½ shares of its common stock, the capital value of which was fixed at $1 per share, in exchange for 34,875 shares of the Texas joint stock association, also known as Anderson, Clayton & Co., which thereafter dissolved. On or about April 21, 1930, an additional 46,687½ shares of common stock were sold at $1 a share to the managing officials of the corporation resulting in the following total common stock ownership by the chief managing officials:

W. L. Clayton	44,800
M. D. Anderson	31,000
Lamar Fleming, Jr.	12,000
Harmon Whittington	5,000
D. B. Cannafax	2,750
L. L. Fleming	2,500
Six minor officials	1,950
	100,000

3. The original capitalization of the corporation, i. e., $25,842,375 of first preferred stock and $100,000 in common stock, was designed to have existing values represented by preferred stocks and to utilize the 100,000 shares of $1 common to adjust the participation of the managing officials in future earnings above the contracted return on first preferred.

4. Cotton merchandising is primarily a management business and is regarded as one of the most difficult and complex merchandising operations in the world. The results of a whole year's business depend upon difficult day-to-day decisions by top executives as to the purchase and sale of spot cotton and the placement of hedges upon domestic and foreign futures exchanges. Long experience in all phases of the cotton business is almost essential to the success of a top cotton executive. It is difficult to obtain executives from other fields who can capably manage a cotton business.

5. The ownership of the common stock was surrounded with restrictions which were designed to insure its holding and use as a method of rewarding management. From the beginning it was understood by the common-stock holders, all of whom were active in the business, that the stock was not salable outside the managing directors of the business, and that even within that group the disposition was to be made in accordance with the responsibilities of and contributions to management by the different executives as determined by the holders of at least 75 percent of the common stock. It was understood that no stockholder was entitled to sell his stock and none could keep it unless the others wanted him to. It was likewise understood from the beginning that the respective interests in the common stock would be adjusted among the managerial group as responsibility changed.

6. On February 14, 1931, an agreement in writing was entered into between the corporation and the holders of all its common stock, all of whom were actively engaged in the business. This instrument embodied, among other things, the provisions of the general understanding theretofore existing among the common-stock holders with reference to the restrictions upon the holding of the stock and the plan for its use as a method of rewarding management. The agreement provided, in substance, that:

(1) All the common-stock holders of the corporation agreed to endorse their common stock to Monroe D. Anderson as trustee for a period of 10 years.

(2) The stockholders retained the right to vote their stock.

(3) The stockholders agreed that they could not assign, transfer, or otherwise dispose of their common stock without the written consent of the holders of 75 percent of the stock.

(4) On the death of any party to the agreement, the corporation agreed to purchase the common stock of the deceased party at the value determined as of July 31, immediately preceding the death, according to the provisions made in the contract for the annual determination of value by the executive committee of the corporation, but in no event less than $1 per share, plus six percent interest from such date to the date of death.

(5) A consolidated balance sheet for the corporation and all its subsidiaries was to be prepared as of July 31 of each year (the end of its fiscal year); and, in addition, for the private use of the individual parties to the agreement, a supplementary balance sheet, adjusted on account of appreciation and depreciation of the value of properties held by the corporation and its subsidiaries so as to reflect the true net worth of the corporation (without any allowance for good will), was also to be prepared and approved by the executive committee of the corporation as soon after the end of each fiscal year as practicable. The value of the common stock as shown in the supplementary balance sheet was to be fixed as the value of that stock for purposes of the contract.

(6) The owners of 75 percent of the common stock could at any time in writing request any party to the agreement to sell all or any part of his common stock to the corporation, or to such person as they might designate, upon terms agreeable to seller and buyer; and if seller and buyer could not agree, then according to

the value fixed for the common stock in the annual supplementary balance sheet approved by the executive committee, as in the case of the death of any party to the contract.

(7) Any owner of common stock held by the trustee under the agreement could elect at any time to withdraw and sell his common stock to the corporation upon terms mutually agreeable by giving written notice of his desire to the trustee. If the corporation and the party could not agree upon the selling price, then the value fixed in the annual supplementary balance sheet was to be used, substantially in the same way as in the case of death of a party.

(8) No dividends could be paid on common stock so long as the corporation was indebted in any sum whatever, nor in any event if the dividend would have the effect of lowering the book value of the stock below five million dollars as reflected in the consolidated balance sheet of the corporation, nor unless an amount of preferred stock equal to the dividend was retired at the same time.

(9) Any common stock purchased by the corporation under the terms of the agreement could be sold to the remaining parties to the agreement or to any other person whom the owners of 75 percent of the remaining stock might designate in writing.

(10) Any future holder of common stock could become a party to the agreement merely by signing it or giving his consent to its provisions in writing.

(11) All the parties to the agreement agreed that any common stock thereafter acquired by any of them, in whatever manner, should automatically be subject to all the terms of the agreement and should be endorsed to the trustee.

(12) The agreement could be amended, altered, revised, or canceled at any time by an instrument in writing signed by the owners of 75 percent or more of the common stock.

7. Until the year ending July 31, 1937, the contract value of the common stock was, by authorization and declaration of dividends thereon in second preferred stock, maintained at approximately $1 a share, such course having been abandoned when the Commissioner sought to tax such stock dividends.

8. From time to time also as junior officials assumed more responsibilities and duties, shares of common stock were in pursuance of said agreement and in the ordinary course

of business transferred by W. L. Clayton and M. D. Anderson to junior management officials so that upon his death M. D. Anderson held only 18,574 shares of the 31,000 originally issued to him.

9. All of the transfers of the corporation's common stock were made only to persons who occupied positions of managerial responsibility in the business and at the value determined under the agreement.

10. During its fiscal year ending July 31, 1944, Anderson, Clayton & Co., allocated and sold 6,500 shares of its common stock to the managing officials shown at the contracted valuation of $112.68 a share in recognition of increased responsibility and duties:

Names	Shares	Price
H. Whittington	2,000	$225,360
Sydnor Oden	1,250	140,850
W. H. Koar	1,500	169,020
J. M. Johnson	1,250	140,850
W. E. Parry	500	56,340
Total	6,500	732,420

11. The corporation received in payment the notes of the employees in the form approved by the directors. Counsel stipulated that the $112.68 received might, for the purposes of this case, be treated as though it were a cash sales price.

12. Of the officials to whom the corporation transferred 6,500 shares of the 18,574 purchased from the Estate of M. D. Anderson, Harmon Whittington was the vice-president in charge of trading policies and cotton merchandising activities; W. H. Koar, a vice-president in charge of the New York office and of relations with New York banks; Sydnor Oden, a vice-president in charge of cotton export sales; J. M. Johnson, a vice-president in charge of new plant and industrial activities; and W. E. Parry, the controller and chief accounting officer of the business.

13. The 6,500 shares of stock so allocated and sold was a part of the 18,574 shares acquired by the corporation on December 15, 1939, from the Estate of M. D. Anderson at its contracted supplementary balance sheet valuation of $50.79 per share.

14. The difference, over stated value, between the amount of $330,135 paid the Estate of M. D. Anderson for 6,500

shares at $50.79 a share, its value at the time of the death of M. D. Anderson in 1939, and $732,420, the price at which such stock was transferred to the managing employees mentioned in 1944 at $112.68 a share was credited by plaintiff to Capital Surplus (plaintiff consolidated and relabeled some of its surplus accounts) and no income was reported for income tax purposes.

15. The effective certificate of incorporation of Anderson, Clayton & Co. authorized the issuance of 477,856 shares of stock, of which 300,000 shares, par value $100, was participating four percent cumulative first preferred, 75,000 shares, par value $100, was participating four percent cumulative second preferred stock, and 102,856 shares without nominal or par value was common stock. No preemptive rights existed as to common stock which could be issued at the discretion of the Board.

16. After four percent dividends on the preferred stocks were paid or set aside, the effective certificate of incorporation provided for the establishment of a "Common Stock Surplus" to consist of the undistributed surplus on July 31, 1938, less any unpaid accrued dividends on preferred, increased during each succeeding year by:

(1) Five Dollars per share on all Common Stock outstanding; and

(2) Four percent per annum on the Common Stock Surplus balance.

Any remaining undistributed surplus constituted "Participating Stock Surplus" which after payment of all cumulative preferred dividends and distribution of the entire "Common Stock Surplus" could be distributed as dividends, one-half to the Participating Preferred Stocks and one-half to Common.

17. Upon dissolution assets were distributable, first, to cover the par value and cumulative dividends of preferred stocks, then to common to cover the Common Stock Surplus and an amount of $1 per share, after which all remaining assets were divisible equally between preferred and common.

18. The agreement of February 14, 1931, was continued in effect during the taxable years involved by an instrument executed on April 16, 1943, extending its term until August 1, 1953. Such agreement provided that in case of death the

value of the common stock for the purposes of the agreement should be $1 per share plus the proportionate interest of the stock in the Common Stock Surplus and Participating Stock Surplus determined by the Board of Directors as of the July 31st immediately preceding such death plus four percent from such date to the date of death. It further provided that:

> In determining such proportionate interest there shall be excluded from the common stock surplus the excess of cost of any shares of common stock held as treasury stock over $1.00 per share, and shares held as treasury stock shall be excluded from the total number of shares participating.

Any holder could be required to sell at such price upon request of 75 percent of the holders and upon withdrawal was entitled to payment for his stock at such price.

19. The balance sheet of the corporation as of July 31, 1943, approved by the Directors on November 30, 1943, showed the Capital Stock and Surplus of the corporation as follows:

Capital stock and surplus:		
Participating 4% Cumulative preferred Stock, par value $100.00 per share:		
First preferred, 272,411 shares		$27,241,100.00
Second preferred, 54,441 shares		5,444,100.00
		32,685,200.00
Common stock, no par value, 84,083 shares		84,083.00
Surplus, per annexed statement		14,728,679.65
		47,497,962.65

20. The Common Stock Surplus as of July 31, 1943, was approved as follows:

Common stock surplus:		
Balance at July 31, 1942		$5,079,070.03
Provision for cumulative $5.00 per share and 4% on balance	$623,352.80	
Less adjustment account 665 shares purchased	54,796.84	568,555.96
		5,647,625.99

21. Valuation of the common stock as of July 31, 1943, was determined as follows:

Valuation of stocks:	
Preferred—326,852 shares outstanding, par value	$32,685,200.00
Participating surplus	4,497,212.96
Total value ($113.76 per share)	37,182,412.96
Common—84,083 shares outstanding, paid in value	$84,083.00
Common stock surplus	5,647,625.99
Participating surplus	4,583,840.70
Total value ($122.68 per share)	10,315,549.69

22. When the company bought the 18,574 shares of common stock held by M. D. Anderson at the contract price of $50.79 per share (i. e., the amended value of $48.33 as of July 31, 1938, plus interest to the date of his death), the cost over the $1 stated value of 15,539 shares was charged to Surplus-Allocated to Common Stock. The remaining 3,035 shares were sold on December 22, 1939, to W. L. Anderson at its July 31, 1939, valuation of $32.27 per share, and the difference between the $50.79 cost per share and the $32.27 selling price per share, or $56,208.20, was charged to Surplus-Allocated to Common Stock. When 1,000 shares were sold on February 28, 1941, at $33.62 a share Surplus Allocated to Common Stock was credited with $32,620 (the selling price over stated value, or $32.62 per share), which resulted in a net deficit of $17,170 for these 1,000 shares.

23. Upon the sale of the 6,500 shares of common stock at $112.68 a share, such stock not participating in the dividend of $10 a share just previously declared on the 84,083 shares outstanding, Treasury Stock-Common was credited with the stated value of $6,500 and the excess of cost over stated value of the 6,500 shares sold in the sum of $323,635 [$309,526.16 plus $14,108.84]. Capital Surplus was credited with $725,920, the excess of the sales price over the $6,500 stated value.

24. At the time the Treasury stock was acquired, it was charged at cost, not at stated value, to "Treasury Stock-Common." To prepare balance sheet statements the differ-

ence between the stated value of the stock and its cost was set up in a reserve for valuation, and then the capital account was reduced by the stated value of the outstanding common stock as shown on the balance sheet. The cost of the stock over the stated value was charged to surplus; then when the stock was sold treasury stock was credited with its cost and the difference between cost and sales price was put into surplus.

25. The common stock bought from shareholders was not cancelled or retired but the shares outstanding less those held in the treasury were used in all financial statements, in the payment of dividends, in arriving at the per share values under the agreement. Treasury stock was not voted at meetings of shareholders nor taken into account in payment of dividends. During the taxable year involved there was no authorized unissued stock.

26. The stated $1 per share value of the common stock, which represented its capital under the laws of Delaware, was nominal and the substantial value of such stock was represented by the Common Stock Surplus and the Participating Surplus which amounted to $111.68 per share as of July 31, 1943, after deduction of the $10 dividend declared on November 30, 1943.

27. Under the certificate of incorporation, the agreement between the corporation and its common-stock holders and the method of accounting there required and consistently followed, the respective purchases and sales of common stock amounted in substance, in the case of purchases by the corporation, to the withdrawal by the stockholder of earnings accumulated during the period of the ownership of such stock, and in the case of sales by the corporation to new managers to a contribution of capital in an amount equal to accumulated earnings so as to equalize the common equity of all stockholders and the distributions during the ownership of such stock by the executive permitted to buy it.

28. The purchase of the 18,574 shares of the common stock from M. D. Anderson in 1939 was in conformity with the plan that the common stock should be held only by and sold only to active management. The purchase by the corporation was not for the purpose of investment or to deal in its

common stock as it would the stock of another corporation. Under the stockholders agreement with the corporation such common stock could be sold only to persons and upon such terms as might be agreed upon in writing by the holders of 75 percent of the stock held by the trustee. Such stock could not be issued or transferred by the corporation until the stockholder executed acceptance of the agreement.

29. The sale of 6,500 shares of the common stock to various junior officials in December 1943, was to adjust the respective holdings in the common stock in accordance with responsibility, and to reward managerial performance by the ownership of common stock which would keep cash in the business and compel the executives to acquire the proprietary interest deemed essential, and not for the purpose of dealing in its stock as it would the stock of another corporation.

30. Upon original issuance the corporation received $1 a share for its common stock, or $18,574, for the stock repurchased in 1939 from the M. D. Anderson estate. This repurchase of the 18,574 shares of common stock on December 15, 1939, at $50.79 a share from the M. D. Anderson estate reduced the assets of the corporation by the amount of $943,373.46. The sale of 3,035 shares to W. L. Anderson on December 22, 1939, at $32.27 a share increased the net assets by $97,939.45, and the sale of 6,500 shares at $112.68 a share on November 30, 1943, increased the assets of the company by the amount of $732,420.

31. Following examination, the Commissioner of Internal Revenue determined that Anderson, Clayton & Co. realized a long-term capital gain in the amount of $402,285.00 on which the tax was $100,571.25 and with other adjustments determined a deficiency of $89,337.66, which was paid on August 27, 1947.

32. Claim for refund in the amount of $100,571.25 was executed October 18, 1947, and was filed by plaintiff on October 20, 1947.

33. On or about January 20, 1951, plaintiff received by registered mail an official notice, dated January 18, 1951, of disallowance of its claim of October 18, 1947.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States One Hundred Thousand Five Hundred Seventy-one Dollars and Twenty-five Cents ($100,571.25), with interest as provided by law.

PROCEEDINGS FOLLOWING OPINION OF THE COURT

On August 23, 1954, defendant filed a motion for a new trial or for a rehearing.

On October 5, 1954, the court entered the following order on said motion:

Order

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 and 54 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this fifth day of October, 1954, that said motions be and the same are overruled as follows:

* * * * *

626–52 Anderson, Clayton & Co. Defendant's motion.

* * * * *

BY THE COURT:

/s/ Marvin Jones
MARVIN JONES,
Chief Judge.

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